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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR VIDANA CHAVOUAN,

Defendant and Appellant.

D052679 (consolidated with
D053263)

(Super. Ct. No. SCD168622)

APPEAL from a postjudgment order of the Superior Court of San Diego County,
David M. Szumowski, Judge. Reversed and remanded with directions.

In these consolidated cases Hector Vidana Chavouan appeals from the trial court's denial of additional custody credits which Chavouan contends he accrued while in two separate residential treatment programs amounting to an additional 307 days. The Attorney General concedes the trial judge should have granted at least 60 additional days of credit. While we agree with the Attorney General's concession, we will reverse and

remand the matter to the trial court to conduct an evidentiary hearing to determine whether Chavouan is entitled to additional credits beyond the conceded 60 days.

FACTS AND PROCEDURAL BACKGROUND

Following his convictions of two drug offenses Chavouan was committed to the California Rehabilitation Center (CRC) for drug treatment. When Chavouan failed to successfully complete the treatment program he was returned to the criminal court and a six-year prison term was imposed. At the time of the execution of the prison sentence Chavouan received credit for 1,076 days in custody.

In subsequent proceedings Chavouan requested the trial court to grant 307 additional days of custody credit for time he spent in two residential treatment programs before he was committed to CRC. The trial court summarily denied the requests stating that credits could only be granted for time spent in a locked facility.

DISCUSSION

Chavouan contends the time he spent in two residential treatment programs should qualify as custody as that is defined in Penal Code section 2900.5. Under that section, time in a treatment facility can qualify as custody if the conditions of the program are sufficiently restrictive to be the equivalent of custody in a penal institution. (*People v. Ambrose* (1992) 7 Cal.App.4th 1917, 1921-1922; *People v. Reinertson* (1986) 178 Cal.App.3d 320, 326-327.) The question of whether the conditions of such a treatment program are the equivalent of custody is a factual matter to be decided in the first instance by the trial court. (*Ambrose, supra* at p. 1922).

Based on the materials submitted to the trial court, the Attorney General effectively concedes the first 30 days of each of the programs were under "locked" conditions and should be credited as custody time, but contends the record does not support any further credits. Chavouan would like this court to decide the factual issues on the record before us without remand because delay in resolution may deprive him of the benefit of the credits as he may have served his sentence before further proceedings can be held. While we are sympathetic to the request, and it is clear the trial court erred in its summary denial, we cannot determine the precise nature of the restrictions during the full terms of the residential programs without further development of the facts. It is clear from the respondent's concession that Chavouan should at least receive an additional 60 days. Whether he is entitled to more requires an examination of the facts, which an appellate court is ill equipped to do.

Chavouan also argues the prosecution and the probation department personnel present at the trial court proceeding did not contest the validity of his factual assertion and thus should be barred from challenging any of the proposed credits on this appeal. We decline to apply waiver principles to this case. The trial court's discussion of the issue was quite abrupt and certainly did not welcome comments from counsel. The court ruled simply and directly that only time in a locked facility qualified and the facilities in question did not meet that standard and denied the request. There was no argument or discussion from either side on the question. Accordingly we cannot fault either the prosecution or the defense for its silence. Further, since the trial court firmly applied the wrong standard we cannot consider that it made any factual analysis of the circumstances

of the defendant's time in the two residential treatment programs. Therefore the case must be returned to the trial court to conduct an evidentiary hearing and award at least 60 days additional custody credit.

DISPOSITION

The order denying additional custody credits is reversed. The case is remanded to the superior court with directions to hold an evidentiary hearing on the defendant's request for additional custody credits and to award at least 60 days in additional credits. The trial court is also directed to amend the abstract of judgment accordingly and to forward the amended abstract to the Department of Corrections and Rehabilitation.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.